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Supreme Court of the United States

DONATTO FILLIPPON,
Petitioner,
against
ALBION VEIN SLATE COMPANY,
Respondent.

No. 241
October Term,
1917.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to Review a Decree or Judgment of that Court Affirming the Judgment of the District Court of the United States for the Eastern District of Pennsylvania.

BRIEF FOR PETITIONER

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SUPREME COURT OF THE UNITED STATES.

Donatto Fillippon,
Petitioner,
against
Albion Vein Slate Co.,
Respondent.

No. 622 October Term, 1917.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a decree or judgment of that Court affirming the judgment of the District Court of the United States for the Eastern District of Pennsylvania.

BRIEF FOR PETITIONER.

Statement of the Case

This cause is brought here upon a writ of certiorari issued by this Court to the United States Circuit Court of Appeals for the Third Circuit on the 18th day of October, A. D., 1917 (Trans. p. 50). The action was commenced on the 10th day of May, 1915, by Donatto Fillippon, a citizen of the Kingdom of Italy and a subject of the King of Italy. The cause of action was trespass to recover damages for personal injuries which the plaintiff suffered due to the defendant's negligence in the course of plaintiff's employment. The defendant was a Pennsylvania corporation doing business at Pen Argyl in the County of Northampton and State of Pennsylvania. The accident happened on the 31st day of July, A. D., 1914, and while the plaintiff was engaged in the duties of his employment at the defendant's slate quarry. (Trans. p. 9). The specific negligence alleged was the failure of the defendant company to furnish a reasonably safe place to work; failure to warn and instruct the employee as to the

defects in methods and machinery; failure to provide methods, appliances and machinery which were in common and ordinary use by others in the same line of business, and that the plaintiff was injured while acting under the direct orders and instructions of his foreman by yielding his own judgment to the superior judgment of the defendant to whose orders and directions the plaintiff was bound to yield (Trans. p. 3-4).

No answer was filed by the defendant. The plea of "Not guilty" was filed by the defendant on April 19, 1916.

The case was tried in the District Court of the United States for the Eastern District of Pennsylvania at Philadelphia before District Judge Witmer of the Middle District of Pennsylvania (specially presiding) and a jury, on the 9th day of October, 1916. The Court delivered the charge to the jury to which the plaintiff did not except, but the defendant excepted to so much of the Court's charge as related to the plaintiff's contention that the plaintiff could not be held guilty of contributory negligence when he was acting under the immediate instructions of his foreman and yielded to such instructions contrary to his best judgment and when the danger threatening was not imminent or inevitable. (Trans. p. 38-39). After noting defendant's exception, the case was submitted to the jury, whereupon the jury retired to the jury room in charge of a tipstaff or bailiff. After the presiding Judge retired to his Chambers, another District Court Judge started the trial of a case in the court room where this case was tried. After deliberating some time, one of the jurymen wrote a note and handed same to the tipstaff or bailiff in charge guarding the jury room to be conveyed to the trial judge, and without calling the jury into open court for further instructions and without notifying the parties or counsel in the case, (who were present in Court at the time) wrote an answer in reply to the written question thus com-

municated to the trial judge and pursuant to said reply the jury returned a verdict in favor of the defendant. (Trans. p. 39). The counsel for plaintiff were not advised of what the Court had done until one of the members of the jury complained about the instructions sent to the jury room. An investigation developed that the question and answer in the communications between the court and jury were both preserved and in the hands of the Clerk of the Court. Immediately a motion was filed for a new trial assigning among other reasons the secret instructions and communication between the court and jury after the jury had retired to deliberate without calling the jury into open court and without informing the parties or their counsel, and that the Court erred in the substance of the instructions thus communicated to the jury. At the time of the argument of the motion for a new trial, an exception was noted upon the request of the plaintiff to the substance as well as the manner and form in which the instructions to the jury were given by the trial judge by answering a communication from the jury not in open court and without notice to counsel who were present in Court at the time. (Trans. p. 40-41). The District Court refused the motion for a new trial and judgment was entered on the verdict December 21, 1916, (Trans. p. 42-43).

On January 18, 1917, the plaintiff filed his petition for a writ of error from the judgment and assigned for error;

(1) The communication of instructions by the Court in Chambers to the jury after the jury had retired to deliberate in the absence of counsel and the plaintiff, and not in open court.

(2) The substance of the instruction.

(3) The manner of privately communicating with the

jury by the Trial Judge not in open court and in the absence of plaintiff and his counsel. (Trans. p. 44).

The questions thus raised by the assignments of error were argued before the Circuit Court of Appeals for the Third Circuit on the 16th day of March, A. D., 1917, and on the 17th day of May, 1917, the Circuit Court of Appeals in an opinion by McPherson, C. J., handed down an opinion affirming the judgment of the court below, (Trans. p. 46-48). A petition for a writ of certiorari was presented in the Supreme Court of the United States on the first Monday of October, 1917, after complying with all the requisites necessary for such presentation, which petition was allowed on the 18th day of October, 1917.

THE FACTS IN THE CASE

On the day of the accident, July 31, 1914, Donatto Fillippon was employed by the Albion Vein Slate Company, the defendant, as a rubbish hand in its slate quarry near the town of Pen Argyl, Northampton County, Pa., and had been employed in this capacity for about one year and three months. His foreman was Humphrey Davis, (Trans. p. 9). The foreman and his son were working about three or four feet from where Fillippon was loading rubbish into a rubbish box. Humphrey Davis and his son were trying to lift a block of slate about five feet long, four feet wide and six or seven inches thick by means of a crow-bar as a lever preparatory to adjusting a chain around the block so that it could be fastened to the cable to draw same out of the quarry. Humphrey Davis asked the plaintiff to insert a stile or wedge, made out of a piece of railroad iron, under the block while he and his son were raising the block. Fillippon pushed the stile or wedge about six inches under the block and then he told the foreman that he was afraid to put his arm further under the block and started to get a shovel handle or a stick, which had been formerly used for this pur-

pose, to push it under the block so that if the block would tilt it would not injure him. Humphrey Davis told him to go ahead and put the stile under with his hand, (Trans. p. 11). Fillippon demurred again and said that he wanted to get something; that he was afraid to put his hand under the block, but Davis told him to go ahead and put the stile under the block with his hand, (Trans. p. 15). Fillippon obeyed his foreman, put the stile under with his arm, the stone tilted and crushed his arm so that the arm had to be amputated about three or four inches below the armpit. There was no imminent or certain danger from using the arm to push the stile under the block. There was only danger at times, depending upon the support of the block, (Trans. p. 24). Humphrey Davis admitted that he told him to put this wedge under the stone but he did not recall whether or not he said that he was afraid to put it in with his hand, (Trans. p. 21). William Davis, the son of Humphrey Davis, who was present at the time of the accident, testified that he heard his father tell Fillippon to put the stile under the block, but he does not remember that he told him to put his hand in, (Trans. p. 28-29). The testimony showed that on former occasions a stick or the handle of a shovel was used to push the stile in. The customary method to put the stile or wedge under the blocks was a long pole with a hook on the end or the handle of a shovel. (Trans. p. 16).

Alexander McKenna, who was Superintendent of the Albion Vein Slate Company from 1912 to 1916, and therefore Superintendent at the time of the accident, in testifying as to the method in common and ordinary use by others in the same line of business, stated that the workmen were not to use their hand at any time in pushing the stile or wedge under blocks, and further testified that he made it a point to instruct the labor hands and all men to be careful not to use their hands. (Trans. p. 19-20). The rate of wages of Fillippon at the time of the accident was One dollar and eighty

cents a day and his expectancy of life according to the mortality tables was 40.75 years. (Trans. p. 18).

Facts concerning communication by the Court and Jury not in open court and in the absence ofcounsel.

After the case was submitted to the jury the Trial Judge retired from the court room into Chambers and another judge occupied the court room for the trial of a case. The jury had deliberated for some time when some member of the jury sent by the bailiff or tipstaff to the Court in Chambers the following question:

> "Whether the plaintiff in pushing the wedge beneath the block of slate with his hand, having full knowledge of the risk involved, thereby became guilty of contributory negligence, even though told by Foreman Davis to 'push it under'." (Trans. p. 39).

The Court, without calling the jury into open court and without notifying counsel for plaintiff who were present in court at the time and waiting for the return of the jury, wrote, in his Chambers, the following answer which he sent to the jury room with the tipstaff or bailiff:

> "If he was told to put it under as stated by the plaintiff and he did so, fully appreciating at the time the danger attending, and having sufficient time to consider, when he was face to face with a situation that would have made a reasonably prudent man to disobey the orders of the foreman, notwithstanding, and he went ahead in spite of the dangers known to him and apparent, he is guilty of contributory negligence." (Trans. p. 39).

Both the manner of conveying these instructions and the

substance of these instructions were made the basis of a motion for a new trial. When the motion for the new trial came up for argument before the Trial Judge an exception was allowed by the Court to the plaintiff both as to the manner or method in which the instructions were conveyed and as to the substance of the instructions. (Trans. p. 39-41).

LEGAL ARGUMENT.

There are two questions in this case and either one is controlling. They are as follows:

1. Did the Trial Judge err in giving written instructions to the jury after the jury had retired to deliberate not in open court nor in the presence of the parties or their counsel and given without their consent or knowledge?

2. Were the instructions erroneous?

FIRST POINT

1. The Court erred in communicating with the jury by giving further instructions not in open court without notifying the parties or their counsel present.

These two legal questions above stated formed the basis of the application for a new trial in the District Court below and also the basis for the assignments of error on the appeal from the judgment of the District Court to the Circuit Court of Appeals and we respectfully submit that the Circuit Court of Appeals erred in affirming the judgment of the lower Court on the legal questions thus raised and involved.

It is with reference to the former question that the District Court of the Eastern District of Pennsylvania and the Circuit Court of Appeals for the Third Circuit in affirming the District Court, differ in their opinions from the decisions

of the Circuit Court of Appeals of the Sixth Circuit and the Circuit Court of Appeals of the Eighth Circuit, as well as the doctrine of the Supreme Court on the same subject, and also differ and are in conflict with the decisions of the Supreme Court of Pennsylvania which is the highest appellate court in the State of Pennsylvania, as well as the decisions of nearly every other appellate state court of the whole United States. The Circuit Court, by Judge McPherson, of the Third Circuit in the opinion on the question of whether it was error for the trial judge to give written instructions in answer to a request from the jury not in open court and not in the presence of, nor with the knowledge of counsel then present in open court, states as follows:

> "Upon this subject the federal courts have not yet passed, as far as we know, but numerous cases have arisen in the state courts and have resulted in two divergent lines of decision. The authorities are collected in a note to North Dakota vs. Murphy, 17 L. R. A. (N. S.) 609 (1909), and we see no need to add a prolonged discussion to the 50 or more opinions already in the books. Numerically, the opposing cases are fairly equal, and in weight of argument also there is little to choose between them."

A. CONFLICT OF THIS DECISION WITH OTHER FEDERAL DECISIONS.

We respectfully submit that the learned Circuit Judge who wrote the opinion evidently overlooked certain portions of the brief for the plaintiff-in-error submitted at the time of the argument of the case before the Circuit Court of Appeals for the Third Circuit, because special attention was called in the brief to the decision of the Circuit Court of Appeals for the Sixth Circuit in Yates vs. Whyel Coke Company, 221 Federal Reporter, 603, as well as the opinion of the Circuit Court of Appeals for the Eighth Circuit in Aerheart vs. St. Louis I. M. & S. Ry. Co. 99 Federal 907, as well

as the opinion of Mr. Justice Gray in Stewart vs. Wyoming Ranch Co., 128 U. S. 383 (32 L. Ed. 439) and the printed brief submitted at the time of the argument contained copious extracts from the opinions on this very question. The learned Circuit Judge who wrote the opinion of the Circuit Court of Appeals for the Third Circuit also evidently forgot during the time that intervened between the time of the argument and the time of writing the opinion that a special effort was made to bring the decisions in the above cases to the attention of the court at the argument. When the learned judge of the Circuit Court of Appeals further refers to the numerical equality of the two lines of cases as given in the foot-note of North Dakota vs. Murphy, 17 L. R. A. (N. S.) 609, we also must differ as to any numerical equality existing or anything near a numerical equality. We concede that the decisions of the state courts of the State of New Hampshire and Virginia are at variance with all the rest but we will not concede that there is anything like any equality numerically. Not that we are contending that your Honorable Court or any other appellate court should erect for themselves scales and throw all the decisions into one side or the other of the scale and thereby decide which line of cases to follow, because it is a question of reasoning and justice that we are trying to present and impress on this court and not a question of arithmetic.

The only case that we have been able to find in which the question was raised before the Supreme Court of the United States was the case of Stewart vs. the Wyoming Ranch Co., 128 U. S. 383, (32 L. Ed. 439), where in an opinion by Mr. Justice Gray the question is referred to as follows:

> "The remaining objection argued is to an instruction given by the judge to the jury in response to a question asked by them upon coming into court after they had retired to consider their verdict. It is a conclusive answer to this objection, that no exception was taken to this instruction at the time it was given,

> or before the verdict was returned. The fact that neither of the counsel was then present affords no excuse. Affidavits filed in support of a motion for a new trial are no part of the record on error, unless made so by bill of exceptions. The absence of counsel, while the court is in session, at any time between the impanelling of the jury and the return of the verdict, cannot limit the power and duty of the judge to instruct the jury in open court on the law of the case as occasion may require, nor dispense with the necessity of seasonably excepting to his rulings and instructions, nor give jurisdiction to a court of error to decide questions not appearing of record."

It will be noted that in this particular case the instructions were given in open court. Counsel were not present at the time the instructions were given, but particular attention is called to the fact that the language of the learned Judge limits the power and duty of the trial judge to instruct the jury in "open court."

The question was flatly raised before the Circuit Court of Appeals for the Eighth Circuit in the case of Aerheart vs. St. Louis I. M. & S. Ry. Co., 99 Federal Reporter 907. The Circuit Judges who heard the case were Caldwell, Sanborn and Thayer, and in the opinion by Circuit Judge Thayer, we have the following:

> "The practice of sending written instructions to the jury room, or holding other written communication with the jury, after they have retired to consider their verdict, without the knowledge of counsel for the respective parties, has been condemned in numerous well considered cases and has only been upheld in a few instances. Chouteau vs. Iron Works, 94 Mo. 388, 7 S. W. 467; State vs. Patterson, 45 Vt. 308; Bank vs. Mix, 51 N. Y. 558; O'Connor vs. Guthrie, 11 Iowa, 80; Campbell vs. Beckett, 8 Ohio St. 210; Hoberg vs. State, 3 Minn. 262 (Gil. 181). See contra Bassett vs. Manufacturing Co., 28 N. H. 457; Goldsmith vs.

> Solomons, 2 Strob. 296. It will accordingly be conceded that such practice is erroneous, and ought not to be sanctioned."

Circuit Judge McPherson who wrote the opinion in the case under consideration stated that "numerically the opposing cases are fairly equal." Circuit Judge Thayer on the same question said "the practice . . . . . has been condemned in numerous well considered cases and has been upheld in a few instances." Our investigation of the cases confirms Judge Thayer. There are cases where counsel consented or where the communication did not amount to instructions which differ from the universal trend.

The question was recently raised in the case of Yates vs. Wheyl Coke Company, 221 Federal Reporter 603, before the Circuit Court of Appeals for the Sixth Circuit, (Judge Knappen, Denison and Sater) where in an opinion by District Judge Sater, sitting as the Court of Appeals for the Sixth Circuit, it was held:

> "A trial court should avoid instructing a jury in the absence of counsel for the respective parties, when it can conveniently do so, and especially where the supplemental charge covers propositions of law not dealt with by the original charge; but the rule which controls is thus stated by Mr. Justice Gray in Stewart vs. Wyoming Ranch Co., 128 U. S. 383, 390, 9 Sup. Ct. 101, 104 (32 L. Ed. 439); the absence of counsel while the court is in session, at any time between the impanelling of the jury and the return of the verdict, cannot limit the power and duty of the judge to instruct the jury in open court on the law of the case as occasion may require, nor dispense with the necessity of seasonably excepting to his rulings and instructions, nor give jurisdiction to a court of error to decide questions not appearing of record."

It will be noted that in the latter case, as well as in the case of Stewart vs. Ranch Company, supra, the instructions

were given in open court, but not in the presence of counsel and while it was held that this was not error, the power and duty of the judge to instruct the jury is limited entirely to the **open court** and is not extended either by Mr. Justice Gray or by District Judge Sater to the jury room by written communication, and it is conceded by Circuit Judge Thayer that it is erroneous to give such instructions.

B. CONFLICT OF THIS DECISION WITH DECISIONS OF HIGHEST APPELLATE COURTS OF PENNSYLVANIA.

We will next pass to the conflict between the decision of the Circuit Court of Appeals for the Third Circuit as enunciated by Circuit Judge McPherson and the Supreme Court of the State of Pennsylvania, and will then pass to the various cases decided by the highest courts of appeal of other states.

The question of private communications, not in open court, by the Court to the jury in the line of further instruction seems to have been brought to the attention of the Appellate Court of Pennsylvania for the first time in Earon vs. Mackey, 106 Pa. 452, and in this very case, the distinction which the District Court makes in the opinion refusing a new trial is shattered at once. In Earon vs. Mackey, supra, the question which the jury asked and the instructions which the Court gave were preserved, but unfortunately there was no bill of exceptions to the action of the Court. The Supreme Court of Pennsylvania condemned the practice, and stated its position with reference to a communication not made in open court as follows:

> "It is irregular and erroneous for the Court to send instructions to a jury during their deliberations and in answer to their request for information, the jury

being in their room and not in the presence of the Court."

And Mr. Justice Sterrett, with reference to this question, states as follows, in the opinion on page 457:

> "There is nothing in the record on which to base the second specification of error. The depositions taken on the motion for a new trial are no part of the record. It does appear, however, in a note appended by the learned Judge to his charge that after being out all night the jury, in a paper signed by their foreman, asked a question, which was answered by the Court in the affirmative, but he does not say the answer was conveyed by tipstave. If it was so communicated to the jury not then in the presence of the Court, the proceeding was irregular and erroneous, but we can take no notice of any fact or circumstance that occurs during the deliberation of the jury unless it is regularly brought to our attention by bill of exceptions."

We respectfully submit that according to the large preponderance of authorities, the error and impropriety lies in the bare communication of instructions, not in open court. That this is so is plainly apparent from the syllabi in Sommer vs. Huber, 183 Pa. 162, where it was held as follows:

> "Instructions to the jury must be given in open court, where they may be heard by the parties and their counsel."

> "It is error for the trial Judge, in the absence of the parties and their counsel, to send written instructions to the jury after they have retired, although sent in answer to a written request from the jury for instructions."

Nor according to the decision in the above case is the error dependent on any distinction between oral and written

instructions as was attempted to be argued by the defendant in the Circuit Court of Appeals.

The case of Sommer vs. Huber, supra, was reversed solely on the specific ground that it constituted error, and from the extract of the arguments of counsel published with the report of the case, it would appear that appellee's counsel urged the same argument which the Court below adopted as its reason for justifying the communication, but in spite of this, the Supreme Court reversed on the ground (as stated by the Court) "of an unwarranted departure from the rule which condemns secret instructions to the jury in relation to questions raised by the pleadings or the evidence as opposed to the proper administration of justice."

The question was again raised in Pennsylvania in Commonwealth vs. House, 6 Pa. Super. Ct. 92, where the Superior Court of Pennsylvania in an opinion by President Judge Rice reviews the authorities as follows:

> "Unquestionably the Court has discretionary power, of its own motion, to recall the jury and give them further instructions, or withdraw or correct erroneous instructions. As far as we are informed, the usage of the courts of the Commonwealth has been to give such additional instructions only in open court, and this is the safer and the better practice. At all events, this much is established by the overwhelming weight of authority, that it is reversible error to give them after the adjournment of court in the absence and without the knowledge of the parties or their counsel; McNeil vs. State, 47 Ala. 498; Collins vs. State, 33 Ala. 434; Wade vs. State, 12 Ga. 25; Fisher vs. People, 23 Ill., 283; Crabtree vs. Hagenbaugh, 23 Ill. 349; Fish vs. Smith, 12 Ind. 563; O'Connor vs. Guthrie, 11 Iowa, 80; Sargent vs. Roberts, 18 Mass. 337; Merrill vs. Nary, 92 Mass. 416; Read vs. Cambridge, 124 Mass. 567; Benson vs. Clark, 1 Cow. 258; Moody vs. Pomeroy, 4 Den. 115; Taylor vs. Betaford,

13 Johns. 487; Bank vs. Mix, 51 N. Y. 558; People vs. Maurer, 43 N. Y. 1; Hoberg vs. State, 3 Minn. 262; Kirk vs. State, 14 Ohio, 511; State vs. Patterson, 45 Vt. 308.

"Against this weight of authority (quoting from the opinion of Mr. Justice Gray in Read vs. Cambridge, supra), the only cases brought to our notice which countenance a different rule are two in New Hampshire and one in South Carolina, and in the latter the point adjudged related only to instructions as to the form of the verdict given by the Judge to the foreman in open court; and the criticism upon the judgment of this court in Sargent vs. Roberts (18 Mass. 337) was based upon the singular theory that the intercourse between the jury and the Bench is so confidential that often communications from the jury ought not to be disclosed to the bar."

We must again advert to the difference between Circuit Judge McPherson's statement in the opinion that "the opposing cases are fairly equal" and the statement of President Judge Rice of the Pennsylvania Superior Court that "by the overwhelming weight of authority it is reversible error to give them (instructions) after the adjournment of court in the absence and without the knowledge of the parties or their counsel."

The judgment in Com. vs. House, supra, was also reversed, and it may be added that the written question and the written instruction to the jury were known and made a part of the record.

C. CONFLICT WITH DECISIONS ON HIGHEST APPELLATE COURTS OF OTHER STATES.

The universal rule adopted by the appellate courts of New York is that any communications, whether material or not, prejudicial or not, nullified the verdict if not made in open court without the consent of the parties or their counsel, and

while it is a fact that there is one case, Thayer vs. VanLeet, 5 Johns. 111, to the contrary, this case was overruled subsequently in Taylor vs. Betaford, 13 Johns. 487; Moody vs. Pomeroy, 4 Denio. 115; Watertown Bank vs. Mix, 51 N. Y. 558, and Neil vs. Abel, 24 Wend. 185.

In Crabtree vs. Hagenbaugh, 23 Ill. 349, sc. 76 Am. Dec. 694, it was held by the Supreme Court of Illinois that the policy of the law requires that all proceedings should be open and notorious, and that the losing party should not be obliged to go the inconvenience of offering proof that even an error had been committed.

In Danes vs. Pearson, 6 Ind. App. 465, 33 N. E. 976, it was held by the Appellate Court of Indiana that a communication between the Court and the jury is improper and nullifies the verdict, even though the communication is harmless in itself.

In the case of Sargent vs. Roberts, 1 Pickering 337, which is considered the leading case on this subject, the Appellate Court admits that the practice of the trial judge communicating with the jury not in open court and without the presence of the parties, was so long established that nobody questioned its impropriety and was a practice which he had indulged in often himself, but proceeded to denounce and condemn the practice and reversed the judgment, and in doing so said it should no longer continue. It might also be added that the communication in that case was preserved so it could be known exactly what was communicated.

In Meier vs. Morgan, 82 Wis. 289, 52 N. W. 174, the highest Appellate Court of Wisconsin held as follows:

> "But whether counsel be present or not, if the jury are to be further instructed, they should be brought into open court. The rule is strict, but salutary. All court proceedings should be in the open. . . . .

> Nor should a defeated party be required to show that such a communication as here had was in fact prejudicial. He is in fact entitled to have his case tried in open court from start to finish. There is safety from no other rule."

In the case of Cook vs. Green, 6 N. J. L. 109, the Judge called upon the attorneys to go with him to the jury room for the purpose of giving further instructions, in answer to a request from the jury. The counsel refused, and the Appellate Court held that the giving of such further instruction was not error, because he did not do it secretly, nor did he hold private conferences with the jury, and that if he had not notified the parties or their counsel, then it would have been such an outrage upon the essential forms of the trial as to vitiate the proceedings.

In Chicago, etc., vs. Robbins, 43 N. E. 332, the request of the jury and the answer of the judge were preserved, but the Appellate Court of Illinois held:

> "The more important and serious matter, however, is that the jury were not brought into open court."

In O'Connor vs. Guthrie, 11 Iowa, 80, the Judge, in answer to an inquiry in writing from the jury, in the same manner, sent by the bailiff, an instruction material to the determination of the case, and this was done without the knowledge of either party. The Court reversed the judgment and held that further instructions given to the jury had to be given in public and in open court, so that an opportunity may be afforded the parties to know what instructions were given and ask for such other explanation of the instructions as may be deemed necessary.

In Low vs. Freeman, 117 Ind. 341, sc. 20 N. E. 242, there

were questions propounded by the jury to the Judge after retiring and the Court wrote on the communication from the jury and returned it to them, and while the instruction was proper, the Appellate Court held in reversing the judgment that it should have been given by calling the jury into open court.

In Greely vs. Weaver, 5 Atl. 267, the Appellate Court of Maine held that the Court has no right to send an answer to the jury to a question propounded to him in writing by the jurors after they have retired to deliberate on their verdict, without the consent of counsel.

In Hopkins vs. Bishop, 91 Mich. 328, sc. 51 N. W. 902, it was held by the Appellate Court of Michigan that it was error for the trial court to send additional instructions to the jury room in response to a written request from the jury without the knowledge of the parties litigant and without giving them an opportunity of being heard.

In Chouteau vs. Jupiter Iron Works, 94 Mo. 388, sc. 7 S. W. 467, the Appellate Court of Missouri held that all instructions should be read to the jury and in open court, and where after retiring, the jury desires further instructions on the law of the case it should be brought into court to receive such further instruction, and if in answer to a request further instructions are sent to the jury by the bailiff in charge, the records should show the consent of the parties to this procedure.

The Court in this case particularly calls attention, like President Judge Rice, in the case of Commonwealth vs. House, supra, to the fact that the courts of New Hampshire and South Carolina hold to a different rule and are the exceptions.

Is it not singular that the trial court, in order to justify its action in giving private instructions to the jury not in open court, and upon which the trial judge bases his opinion for the refusal of a new trial, resorts to a New Hampshire case and also a case in 20 Missouri Appeal Reports, the decision in which case must have long preceded the leading case of Chouteau vs. Jupiter Iron Works, supra, which is found in 94 Missouri, 388, and which decides such action in the trial court to be erroneous?

In the case of Martin vs. Martin, 76 Nebr. 335, sc. 107 N. W. 580, the Appellate Court of the State of Nebraska held that it was error for the Court, after the jury had retired, to return an answer to a written communication from them without bringing them into court.

In the case of Moseley vs. Washburn, 165 Mass. 417, which is the only case that seems to differ from the universal trend of opinion in that State, the reason stated for the deviation from the general rule is that the only communication sent to the jury was with reference to the computation of interest and the Appellate Court held that since the interest was a mere matter of mathematical computation which the Court could direct the jury to calculate after they had returned a verdict in favor of the plainti without calculating the interest, therefore, the error was of such a nature as would not be held to vitiate the verdict.

In the case of Texas Midland Railroad vs. Byrd, 115 S. W. 1163, the Texas Supreme Court held that it is reversible error for the judge to communicate with the jury otherwise than as provided by law, as by holding conferences with the foreman not in open court and in the opinion by Chief Justice Gaines, a number of cases are cited for the proposition set forth in the syllabus hereinbefore stated.

All the authorities, both for and against the proposition, are collected in the note of State vs. Murphy, 17 L. R. A. (N. S.) 609, from which it will appear that the exceptions are the cases cited by the learned court below as a basis for refusing a new trial and we respectfully submit that no matter what the practice may be in New Hampshire and South Carolina and in an isolated case in Virginia and Missouri, it seems that the Federal Courts of this County have recognized the same principle which we are contending for, to-wit: that any additional instructions given to the jury after the jury have started to deliberate must be in open court and even though they can be given without the presence of the parties or their counsel, the failure to give such instruction in open court admits of no exception. All cases collected in the note under State vs. Murphy, supra, holding communications between court and jury, not in open court, proper and not reversible error can be distinguished except decisions of the appellate court of New Hampshire—here the rule laid down in Sargent vs. Roberts, supra, and kindred cases is expressly overruled.

SECOND POINT

2. Were the instructions erroneous?

The question raised as to the correctness of the instructions communicated in the manner aforesaid to the jury not in open court forms the second assignment of error. The substance of the instruction conveyed to the jury not in open court was in conflict with the rule laid down by the Supreme Court of Pennsylvania in cases of this kind. The instructions thus in conflict with the doctrine laid down by the highest appellate court of the state in which it was tried, was subsequently affirmed by the Circuit Court of Appeals for the Third Circuit, thereby constituting a conflict in the

law laid down by the Federal Courts and the highest state courts in the State, in which the action arose and was tried pertaining to negligence and contributory negligence as enunciated by the Supreme Court of Pennsylvania when an employee is working under the direct eye and instruction of the master and obeys the orders and instructions of the master after voicing his doubt as to the propriety of the orders and the imminence of the danger to be encountered by following his master's instructions. The question that was the jury for decision. That this is so was clearly held in 29 Cyc. 640, where the general rule is laid down as follows:

> "Whether the plaintiff in pushing the wedge beneath the block of slate with his hand and having full knowledge of the risk involved, thereby became guilty of contributory negligence, even though told by foreman Davis to 'push it under' ".

We feel safe in saying that the answer to this question in any state in this Union would have been "No," because the facts as embodied in the question would not make the employee guilty of contributory negligence as a matter of law, but it was one of the questions that had to be submitted to the jury for decision. That this is so clearly held in 29 Cyc. 640, where the general rule is laid down as follows:

> "The fact that the person injured was aware of the danger is not sufficient to render him guilty of contributory negligence as a matter of law but the question should be submitted to the jury."

The court invaded the province of the jury by answering as a question of law that which was a question of fact for the jury to determine.

Instead, however, of answering this question in the only way in which it could be answered as presented, the court

adds elements, qualifications and conditions and by adding those qualifications, elements and conditions the trial court felt enabled to answer the question in the affirmative instead of the negative and in this we say the injury to the plaintiff consisted. We respectfully submit that if this instruction had been given in open court in the presence of counsel, the attention of the court could have been called to the misleading instructions embodied in the answer, and the plaintiff could have requested the court to charge on this point in the language and according to the authorities of the State of Pennsylvania.

An analysis of the answer creates just a suspicion that it was framed with a desire to answer in the affirmative, otherwise it would have been very simple for the court to say that knowledge of the danger in itself when ordered by the foreman to pursue a dangerous task did not constitute contributory negligence as a matter of law, but was a question for the jury under all the facts. But the learned trial judge starts out in his answer, "If he was told to push it under, as stated by the plaintiff, and he did so." There is not much question that this was done, and in fact, this was assumed in the question sent by the jury. The learned trial judge continues further and states "fully appreciating at the time the danger attending." That much also was assumed in the question, and, therefore, did not require any repetition. The learned trial judge then continues, "and having sufficient time to consider." It is hard to understand what difference it would make if a man had sufficient time to consider if he already appreciated the danger. It cannot be assumed that he could get any enjoyment out of musing and meditating upon a danger with which he was already fully acquainted and sufficient time to consider the danger would hardly change the liability of either the employer or employee if he had a week to consider upon a risk or a danger with which he was already fully conversant. The learned trial judge further

says that "when he was face to face with the situation, that would have made a reasonably prudent man to disobey the orders of the foreman, notwithstanding, and he went ahead in spite of the danger known to him and apparent, he is guilty of contributory negligence." By this instruction the trial judge did not submit the question which the courts of Pennsylvania said should be submitted to the jury to determine whether the employee was guilty of contributory negligence, to-wit: the imminence and certainty of injury, but decided as a question of law, the question of fact which the jury was to decide. The jury disagreed on the very question of fact which it was their province to decide, and an ingenious juryman conceived the idea of having the judge decide the question of fact for them. This the judge did in his answer to the question submitted. Did, or did not, the litigant suffer from the action of the court when promptly a verdict was returned according to the judge's decision? The Supreme Court of the State of Pennsylvania, however, has said that even though the employee was fully aware of the danger threatening and if the risk or danger did not threaten imminent or immediate injury, so that a following of the employer's instructions would not mean certain injury, that then if the employee overruled his better judgment and followed the instructions of his superior and injury followed, that he could not be held guilty of contributory negligence as a matter of law. It was for the jury to decide under all the circumstances whether the danger impending was so imminently and inevitably threatening that a reasonably prudent man should have known that an obedience to orders would be followed by certain injury. The following recent cases, decided by the Supreme Court of Pennsylvania, the highest appellate court in the state, clearly show that the instructions as given by the trial judge were erroneous, and that the instructions given by the Court invaded the province of the jury who are the sole judges of the facts and

that upon the assumed facts submitted to the judge, the answer was erroneous.

The rule was clearly laid down by the Supreme Court of the State of Pennsylvania in Glew vs. Pittsburgh Railways Company, 234 Pa. 238, where Glew, a motorman in the employ of the defendant company, was engaged to run a freight car whenever and wherever directed by the superintendent of the defendant's supply department; that on the day of the accident he was instructed to run his car with a load of old wheels on board, and pulling a gondola car loaded with coal behind, over a certain line, the tracks of which were out of repair; that the plaintiff suggested this fact to the superintendent, or his representative, and said that it was dangerous to run the kind of load that he was hauling over these tracks, when he was told that he should proceed to do as he was ordered or he "would learn what would happen to him"; that he carried out the directions of the superintendent, and while on the line the tracks separated, causing the gondola car to drop down and break an axle, with a resulting shock to the freight motor car which displaced the old car wheels and caused one of them to fall upon and injure the plaintiff. The plaintiff admitted on cross-examination that he knew that the tracks were in a dangerous condition; that he protested against running his cars loaded as they were on those tracks, but stated that the superintendent, or his representative, insisted on him doing what he did. On page 242 of the opinion, which was adopted by the Supreme Court, the Court expressly held as follows:

> "It struck us at the trial, and does yet, that the Court would have erred had it said as a matter of law that the plaintiff was guilty of contributory negligence.

"The fact that the person injured was aware of the danger is not sufficient to render him guilty of contributory negligence as a matter of law, but the question should be submitted to the jury. 29 Cyc. 640".

"Again, it is clear from the testimony as we view it, that the plaintiff did not voluntarily run his car over this dangerous track. He did it upon the order of the superintendent of the department in which he was working, the vice-principal of the defendant, and the jury was the proper tribunal to say whether he had a right by that order to infer that the superintendent thought he could safely pass over the tracks, and if that inference was justifiable, to also say that the plaintiff, as employee, trusted to the judgment of his superior. If that were the case, then the true rule would be that laid down by Mr. Justice Mestrezat in Williams vs. Clarke, 204 Pa. 416, which we gave to the jury for their guidance and which reads as follows: 'We think the facts in this case bring it within the well recognized rules laid down in the text books and in our own decisions. The true rule in this case, as in all other cases, is that if the master gives the servant to understand that he does not consider the risk one which a prudent person should refuse to undertake, the servant has a right to rely upon his master's judgment unless his own is so clearly opposed thereto that, in fact, he does not rely upon his master's opinion. A servant is not called upon to set up his own unaided judgment against that of his superiors, and he may rely upon their advice and still more upon their orders notwithstanding many misgivings of his own. The servant's dependent and inferior position is to be taken into consideration; and if the master gives him positive orders to go on with the work under perilous circumstances, the servant may recover for an injury thus incurred, if the work was not inevitably and imminently dangerous.'"

It will be noticed that the facts in our case are strikingly similar to Glew vs. Pittsburgh Railways Company, supra, as appears from the following extract of testimony:

By Mr. Pritchard:

Q. Why were you afraid?
A. I saw that stone was a large one, and I was afraid to put my arm under it.
Q. What were you afraid of?
A. I was afraid to put the piece of iron under.
Q. What were you afraid would happen?
A. The rock was like to fall on my arm.
Q. Did you tell Humphrey Davis you wanted to go after something to shove it under?
A. Yes, I told him, and he told me, 'Go ahead and put under the stile; put under the stile.'
Q. Just give the words that you used as near as you can recollect them.
A. Get him something to put in the stile.
Q. Please repeat, as near as possible, just what you said to Humphrey Davis. Use the words as nearly as you can recollect them.
A. That is all Humphrey Davis has said, 'Go ahead, go ahead.'

By the Court:

Q. Mr. Pritchard is asking you now what you said to Humphrey Davis, your exact words.
A. Get something for to put in the stile, on the block.

By Mr. Pritchard:

Q. What had you usually used before to put the wedge under?
A. I was using sometimes a hook and also the shovel."

(Trans. pp. 15-16)

The Superior Court of the State of Pennsylvania, in the case of Franczak vs. Nazareth Cement Company, 42 Pa.

Super. Ct. 263, laid down the same rule where a workman was hurriedly attempting to cross a track to avoid an approaching car and was directed by the foreman to stop and remove a stone on the track, with the assurance from the foreman that there was plenty of time for him to do so and get away, but while performing the work directed by the foreman he was injured, and it was held that:

> "A servant is not required to act on his own judgment against that of his employer, and if the latter gives him positive instructions to go on with a particular task, he may recover for any injury received if the work is not imminently dangerous."

A case presenting almost similar facts is the case of Moleskey vs. South Fork Coal Mining Co., 247 Pa. 434, which was a case where an employee in a mine complained to the superintendent of the danger from a threatened fall of rock forming part of the roof of the mine heading, and that the latter, after testing the roof with a pick, assured the plaintiff that it was safe and instructed him to proceed with the work. The Court was asked to hold as a matter of law that because the plaintiff knew of the threatened danger and had complained of it to the mine superintendent, that he was guilty of contributory negligence and the Court should so instruct the jury as a matter of law. The Court submitted the question to the jury, and on an appeal the Supreme Court, in an opinion by Mr. Justice Elkins, said:

> "A servant is not called upon to set up his own unaided judgment against that of his superiors, and he may rely upon their advice and still more upon their orders, notwithstanding misgivings of his own."

Mr. Justice Elkins further, in commenting upon the elements which must be considered by the jury when he is acting under the express instructions of the foreman stated as follows:

"Even the rule as thus stated is subject to the qualification that the servant is not warranted in proceeding with his work, if it was inevitably and immediately dangerous to do so, but what tribunal shall determine whether the work was inevitably and imminently dangerous? This necessarily depends upon the facts. It is sometimes for the Court and sometimes for the jury. In the present case, plaintiff had misgivings about the falling of the rock from the roof of the heading, but he was not sure about it, and sent for the superintendent for the purpose of calling his attention to what he apprehended might be an impending danger. When the superintendent assured him that the rock would not fall and ordered him to proceed with the work he obeyed his instructions. Was he justified as a man of common prudence in acting upon the judgment of the superintendent under these circumstances? Was the danger so obvious and imminent as to make it his duty to refuse to continue work when directed to proceed by the superintendent? Appellant argues that appellee admitted on the witness stand that he knew the danger was imminent and by his own admission is precluded from recovering damages in this action. But in this connection we must consider all of his testimony, in order to understand what he meant by the word 'imminent,' which was used by counsel in asking the question and not by the witness in answering it. The explanation of the witness was that while he had misgivings about the safety of the overhanging rock, he concluded after the superintendent sounded the same with his pick and assured him it would not fall, it was safe for him to continue work. That it was a truthful statement was shown by the fact that he did continue to perform the work he was directed to do. He did not know that the rock would fall, and perhaps no one, not even the superintendent, could have determined definitely in advance what would happen. Under all the circumstances of this case we cannot declare as a matter of law that plaintiff was so clearly guilty of contributory negligence as to preclude a recovery. This was a question for the jury and it was so submitted in a careful and painstaking charge by

the learned trial Judge. Ample authority for this position will be found in the following cases: Patterson vs. Railroad Co. 76 Pa. 389; Williams vs. Clarke, 204 Pa. 416; Glew vs. Railways Co. 234 Pa. 238; Collins vs. Coal Co., 241 Pa. 55."

We, therefore, respectfully submit that not only did the Circuit Court of Appeals err in affirming the judgment and opinion of the court below as to the instructions given, but also erred in sustaining the giving of instructions by a trial judge not in open court, not in the presence of counsel, nor with the consent of counsel or their clients. It will once for all subject the jury to an influence which will hardly be kindly received by litigants—the giving of secret instructions when neither they nor their counsel are present so that they can hear what is said to the jury, and it once for all destroys the tradition that a trial is to be held in open court from beginning to end. A litigant who has lost his case will hardly be able to banish from his mind an ever arising "suspicion" as termed by Mr. Chief Justice Parker in Sargent vs. Roberts when the trial judge himself said in the opinion on the motion for a new trial, "That the practice here adopted does not deserve encouragement," and this self-imposed criticism is followed by the Circuit Court of Appeals upholding the act of the trial judge in "we do not say that harm could never happen in the exchange of such a question and answer; the variety and complexity of human affairs are so great that the same act may have a different quality if the atmosphere be different that surrounds it; but so far as we can see, harm is not probable. We agree fully that modification of established practice should be allowed with caution, and we see excellent reasons why every step in a trial up to the rendering of the verdict should be taken in open court, and (wherever practicable) in the presence of counsel also." We are at a loss to understand just what is meant by the learned Circuit Judge's distinction by saying that the "same act may have a different quality if the atmosphere be

different that surrounds it." We assume and have been taught to assume that the atmosphere surrounding a court of justice is the same in Maine as in California, and should be the same in Pennsylvania. And if this practice is dangerous in some atmospheres in a court of justice at some future time it might even become dangerous in the State of Pennsylvania.

What seemed to be viewed as a practice bearing the seeds of probable danger under certain circumstances was classified by Mr. Justice Parker in Sargent vs. Roberts, supra, as an inevitable source of mischief tending to the lowering of the people's confidence in the courts. So timely are his criticisms of this practice that we will ask the court's indulgence for quoting the following extract therefrom:

> "No communication whatever ought to take place between the judge and jury after the cause has been committed to them by the charge of the judge, unless in open court. . . . The only sure way to prevent all jealousies and suspicions is to consider the judge as having no control whatever over the case except in open court in the presence of the parties and their counsel. The public interest requires that litigating parties should have nothing to complain of or suspect in the administration of justice, and the convenience of the jurors is of small consideration compared with this great object. . . . . It is better that everybody should suffer inconvenience than that a practice should be continued which is capable of abuse or at least of being the ground of uneasiness and jealousy."

If the "right of trial by jury shall be preserved," we respectfully submit it must be in open court and should not be swept away by secret influences in the form of private communications not made known to the parties or their counsel.

THIRD POINT

The judgment affirmed by the Circuit Court of Appeals for the Third Circuit should be reversed and a new trial awarded.

Respectfully submitted,

J. Willard Paff,
Calvin F. Smith,
Attorneys for Petitioner,
Easton, Pa.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1918. No. 241.

Donatto Fillippon, Plaintiff in Error,

vs.

Albion Vein Slate Company, Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

COUNTER STATEMENT OF THE CASE.

The plaintiff, a man of full age, was employed as what is known as a rubbish hand, in a slate quarry. He had been so employed for a little over a year and a half,—nearly all of that time in the quarry of the defendant. The work at the quarry was under the direction of a superintendent, with five gangs under him, each gang consisting of four quarrymen or block men, and either one or two rubbish hands to each gang. The slate quarry is an open hole. After a block of slate is quarried, it is raised by crowbars and wedges or stiles inserted under it in order that chains may be put around it for hoisting it out of the quarry. If the block is small the wedges are put under by hand, it not being necessary to insert the hand beyond the edge of the

block. If the block is large the wedges are put in by hand so far as can be done without putting the hand under the block and then a stick or shovel handle or hammer handle is used to push the wedge further under, so that the hand of the operator who is putting the wedge under will not be under the stone in case it should accidentally drop. The rubbish hand was a helper to the four quarrymen, and did generally whatever they directed him to do in the way of helping them. They were all under the direction of the superintendent. As has been said, Fillippon had had a year's and half experience, and was perfectly familiar with this method of doing the work. On the day of the accident, a large block had been quarried, and was being raised for the purpose of putting chains under it. One of the quarrymen directed Fillipon to put a wedge under, and he put a small wedge under as far as he could do so without getting his hand under the stone, then seeing that the block was a large one, and that he would have to put the wedge further in, he was afraid to do so for fear the block might fall on his arm, and he told the quarryman that he wanted to go get something to shove the wedge under. According to his story, the foreman then said to him, "Go ahead, go ahead," and he then shoved the wedge further under the block, putting his arm in for that purpose. The block slipped and crushed his arm.

The defendant asked for binding instructions, on the ground that the danger was an obvious one, known to the plaintiff, and that the evidence rebutted any inference that he did not understand the danger or that he relied upon any superior knowledge of the quarryman. The trial Judge, however, thought that in view of the evidence that the plaintiff was obeying the commands of the quarryman, it was for the jury to say whether he fully understood the danger, and acted as a reasonably prudent man should. The case was submitted to the jury. The Court adjourned. Subsequently, another Judge began a trial in the room vacated by the trial Judge, and pending this trial, and while the trial Judge was in chambers, a written question was sent by the jury to the Judge and an answer in writing

sent by the Judge to the jury, both question and answer being preserved on the record, and an exception granted subsequently to the plaintiff at his request. The jury found a verdict for the defendant.

ARGUMENT.

The plaintiff in error argues his case upon two propositions.

First.—That it is reversible error under any circumstances for a trial Judge to give additional instructions to the jury except in open Court.

Second.—That the substance of the instructions was wrong.

If the substance of the instructions was wrong, of course, the method of giving them is of little consequence and this appeal should be sustained. On the other hand, if the substance of the instructions was correct, the method of giving them is important only if it injuriously affected the plaintiff, and if no injury has resulted or could have resulted, the case ought not to be sent back for a mere technical error.

So far as the substance of the instructions is concerned, very little need be said. They were substantially a repetition of what was said on the same subject in the charge of the Court before the jury retired. At the time the plaintiff was apparently satisfied with the charge for he took no exception. Nor does he even now point out any error. On the contrary, he argues the proposition as though the Court had taken the case from the jury and the only authorities he cites are to the effect that the question of plaintiff's negligence in a case such as this is for the jury and not for the Court. As the Court left the question to the jury, it is hard to see what application this line of argument can have, or what purpose is served by the citation of authorities upon a point which is not in question, unless it be to confuse the Court, by suggesting error where none can be pointed out.

This brings us to the only real question in the case, viz.: Was there such error in the method of giving the instructions that the case must be sent back for a new trial, notwithstanding the substance of the instructions was correct and no harm has been done the plaintiff?

Appellant contends that if any communication passes between the Court and the jury, except in the presence of counsel and in open Court, the judgment must be reversed even though the communication was proper and no possible harm could have been done to either party.

It will of course be conceded that under ordinary circumstances it is the better practice for the Court to hold no communication with the jury except in open court and in the presence of counsel. The Court below in its opinion so states. It is, however, a very different proposition to say that there is an absolute rule of law with regard to such communications that irrespective of any error in the instructions or any injury to the parties by this method of giving them the verdict must be set aside or the judgment thereon reversed.

It is true that the rule has been stated without qualification by a number of text writers and in a number of opinions in the State Courts and the history of how this happened is rather interesting.

Apparently the first appearance of the rule on either side of the ocean was in the case of

Sargent *vs.* Roberts, 1st Pickering 337.

In that case there was a statute of Massachusetts which provided where the jurors returned into Court and stated that they were unable to agree, the Court might give them further instructions and send them out again for further deliberation. The Court received a written request from the jury to be discharged because they could not agree, and sent a written communication refusing to discharge them, and giving them certain instructions. The Supreme Court held that no communication ought to take place between a judge and jury after the cause has been committed to the jury, unless in open court, and where practicable in

the presence of counsel. The rule as stated although probably quite correct, in view of the Massachusetts Statute, and under the circumstances of the particular case, was stated without qualification by the Chief Justice, and has in a number of cases in other States been without question stated as an absolute rule.

In many other cases, however, the Courts have refused to recognize it as an absolute rule, but merely as a rule of practice, the infraction of which may or may not be reversible error, according to the circumstances of the case, and this it is submitted is the sensible doctrine. Wherever there is any suspicion of undue influence or the record of the communication has not been preserved, the Court ought, of course, to reverse, but where the communication is in writing and made part of the record and no injury has been done, the Court, it is submitted, ought not to reverse an otherwise just judgment, because of a mere technical irregularity.

In the Note to

State *vs.* Murphy, 17 Lawyers Report Ann. N. S. 609.

cited in appellant's brief, the annotator has collected most of the cases in the State Courts and has cited some fifty cases in which the principle has been laid down that a communication between the Court and jury not in open court or in the presence of counsel constitutes reversible error and some thirty-eight cases in which it has been held that such communication was not reversible error if no prejudice resulted. To these should added the opinion of the learned Circuit Judge, in this case, than whom none of the authorities quoted on either side of the proposition is entitled to more respect. The apparent numerical supremacy in favor of the rule disappears when it is considered that many of the cases in which the rule has been broadly stated (usually quoting the case of Sargent *vs.* Roberts, 1 Pickering 337 *supra,*) are cases in which, as in the Pennsylvania case of Somer *vs.* Huber, 183 Pa. 162, no record of the communication has been preserved; some like Com'th

vs. House, 6 Sup. Ct. 92, are criminal cases and the decision is specially put on that ground and many others are cases in which there was suspicion of undue influence or there was some prejudice to the parties in the character of the communication.

It is a significant fact also that the very Court which first announced the absolute rule relied upon by appellant has in its later opinions discarded it, and in the case of

Moseley *vs.* Washburn, 165 Mass. 417,

announced the more reasonable rule that communications between Court and jury in the absence of counsel, and not in open court, may or may not be ground for reversal according to the circumstances of the case dependent upon whether prejudice to the parties has resulted therefrom.

The leading case in favor of the qualified rather than the absolute rule is

Shapley *vs.* White, 6 N. H. Rep. 172.

It is so close to the present case in its facts that the report is quoted in full as follows:—

> "Trespass, *quare clausum fregit.* Plea, general is-
> "sue. The action was tried at the common pleas sit-
> "ting in April.
>
> "In order to maintain the defence the defendant at-
> "tempted to show that he had been in the peaceable
> "possession of the *locus in quo* for more than twenty
> "years next preceding the commencement of the suit.
> "The cause was committed to the jury just before the
> "adjournment in the afternoon and about ten o'clock
> "in the evening the jury sent to the Court, at their
> "chambers, a written memorandum, as follows:
>
> " 'The jury wish to be instructed what would
> " 'amount to an interruption of peaceable possession if
> " 'your Honors think proper.
>
> " 'N. W. FOREMAN.'
>
> "To this request of the jury the Court returned an
> "answer, in writing, in these words:
>
> " 'An entry upon land, claiming title, made with the
> " 'knowledge of the adverse party, is an interruption

" 'of peaceable possession. The jury must form their " 'own opinion from all the facts in the case, both as " 'to the fact of peaceable possession and whether the " 'same has been interrupted or not.'

"The counsel of the parties were not present, but "the jury were directed to bring the question and an- "swer with them into Court; on the return of their "verdict, which was done.

"The jury having returned a verdict for the plaintiff "for twenty-five cents damages.

"Coolidge, for the plaintiff, moved for a new trial "on account of the instructions having been given as "aforesaid, and the action was, thereupon, transferred "to this Court upon a case saved. The counsel for the "plaintiff cited and relied upon,

"Sargent *vs.* Roberts, *et al.*, 1st Pick. 337. H. Hub- "bard and Chase, for the defendant. Parker, J., de- "livered the opinion of the Court. In the case cited "by the counsel for the plaintiff, the jury sent word "to the judge that they could not agree and request- "ing his directions, to which he returned for answer, "that so much time had been consumed in the case that "he was unwilling they should separate, 'and giving " 'such directions as would enable them to reconsider " 'the cause in a more systematic manner.' We have "no difficulty in acquiescing in the propriety of a de- "cision granting a new trial, under those circumstances. "There was no application to the judge for any direc- "tion upon any matter of law, arising in the case, nor "was it suggested that the disagreement arose upon any "diversity of opinion among the jury upon any ques- "tion of law involved in it. The instructions were, "therefore, in fact, a new charge to the jury, and this "not at their request. The reasoning of the opinion "in that case, however, goes beyond the facts in the "case, and would preclude the Court from giving, after "an adjournment, any answer to a question of law or "fact without the presence of the counsel, and should

"we adopt the broad rules there laid down, the ver-
"dict in this case must be set aside.

"Before coming to this conclusion, however, it may
"be proper to advert to the situation of this case, at the
"time the instructions were given.

"The case had been committed to the jury, they had
"retired, and the Court had adjourned until the next
"day. The question from the jury was sent at an hour
"when it was extremely inconvenient, if not impracti-
"cable, to assemble the counsel of the parties, and if an
"answer could not be given, as was done in this case,
"the jury must have been left in confinement during
"the night, for want of intelligence upon a point of
"law which might be important in the case, and to
"which the attention of the Court had not been called,
"or upon which the jury had not sufficiently understood
"the directions. Or, in order to escape this hardship,
"the jury might have been induced to agree upon a ver-
"dict upon such conjecture as they were able to form,
"upon the point in question and in the latter case, had
"they mistaken the law, there would have been no way
"of correcting the error; whereas, in the mode adopted
"they would be enabled to come to an intelligent re-
"sult, and, if the Court erred in the instructions, the
"error could be rectified in the same manner as if the
"instructions had been given in open court; and there
"could be no uncertainty as to what directions were
"in fact given.

"It would seem, then, that there could not be any
"prejudice arise to either party from the course
"adopted.

"The jury were relieved from any necessity of re-
"maining until morning, because they could not pro-
"ceed for want of sufficient knowledge of the law; and
"the hardships of juries, although much less than they
"were formerly, are still quite sufficient without impos-
"ing upon them any unnecessary burden.

"The parties had the advantage of having a con-
"sideration of the case, by the jury, with all the in-

"formation upon matter of law that was desired, and "were not exposed to the danger of a result founded "upon conjecture, which, if mistaken, would have been "beyond remedy.

"The Court gave the jury no directions or intima- "tions in relation to the facts of the case, and in per- "forming their appropriate duty, of instructing them "upon matter of law, placed the instruction in such "form that as full opportunity was afforded for excep- "tion to it as can exist in any case.

"No exception to the law itself, as given to the jury, "is suggested.

"If, then, no prejudice has arisen, or can arise, to "either party by such mode—if the ends of justice are "likely to be promoted in this way, while by refusing "an answer the rights of the parties might be left in "some measure to chance, or an unnecessary hardship "imposed upon the jury, the reasons against granting a "new trial are very strong.

"There is nothing in the nature of an adjournment, "according to the practice here, which will lead to a "different result.

"It is the common course to consider such business "as can be conveniently transacted at chambers during "an adjuornment.

"Petitions, and motions of various kinds, are con- "sidered, and claims and bills of cost examined and "allowed. The convenience of suitors and counsel is "thus consulted, and the business of the term facilitated; "and we discover no reason why the Court may not, "with equal propriety, answer a question of law pro- "pounded by the jury, if the rights of the parties are "fully secured, as was done in this case.

"There are two cases in Johnson's Reports which "bear upon this question.

"Thayer *vs.* Van Vleet, 5 Johns. 111, was a case on "*certiorari* from a justice court. At the trial before a "jury, the parties exhibited their proofs and the demand

"appeared to have been sufficiently supported. After "the jury had retired they sent for the justice, who "went to the room where the jury were sitting, and "one of the jury asked him whether they could add any- "thing to the charge of the plaintiff, and the justice "answered no, and left them without anything further "being said. The Court held that the fact of the "justice going to the jury and answering the question "of law put to him, was not an irregularity for which "the verdict ought to be set aside—that there was no "semblance of abuse, and the consent of parties might "be inferred.

"In Bunn *vs.* Croul, 10 Johns. 239, it was held that it "was irregular for the justice, after the jury had re- "tired, to answer a question from them whether a "particular point of evidence had been given, stating "the evidence. A controversy might arise as to the "correctness of the statement, which, as a matter of "fact, could not be settled and corrected by the Court, "as matter of law may.

"The principle to be deduced from these cases seems "to be a sound one. If the jury, after an adjourn- "ment, put a question, respecting the facts of the case, "to the Court, it will be irregular to state the evidence "relating to it; but if they desire instruction, upon a "mere question of law, that may be answered. It "should, undoubtedly, be answered in such way that the "parties may have an opportunity to have it corrected, "if there is any error in the answer, and in this way "all the rights of both parties are secured as effectually "as if the answer was given in open court."

This was followed in

Milton *vs.* Bragilor, 23 N. H. 507;
Bassett *vs.* Salisbury, 28 N. H. 438;

and in the cases cited in the note to

State *vs.* Murphy, 17 L. R. Ann. N. S. 609.

The law is admirably stated by the Court in the case of Buntin *vs.* Danville, 93 Virginia Reports, 213, as follows:—

> "The fifth bill of exceptions relates to the action of "the Court in replying to a question from the jury "without informing counsel until after the rendition of "the verdict. The question of the jury, and the an- "swer of the Court, were both in writing, and are set "out in the record. The reason given by the Court "for not informing counsel before replying to the ques- "tion was that they were engaged in arguing another "case to a jury. Still it is the better practice to ap- "prise counsel of any question asked by the jury that "may affect the case before an answer is returned by "the Court. Argument or other proceeding can al- "ways be suspended for a few moments without seri- "ous interruption. This course should always be pur- "sued, and ground for an exception of this character "be avoided. The answer returned by the Court to "the question propounded by the jury correctly stated "the law, and the irregularity excepted to is not suffi- "cient to vitiate a verdict that is plainly right upon the "evidence and the law applicable thereto.
>
> "For the foregoing reasons, the judgment of the "Corporation Court must be affirmed."

The learned Circuit Judge was entirely right in saying that the Federal Courts had not yet passed upon this question. The cases cited by plaintiff in error, viz:—

Stewart *vs.* Wyoming Cattle Ranch Co., 128 U. S. 383;

Yates *vs.* Whyel Coke Co., 221 Fed. 603;

Aerheart *vs.* St. Louis etc. Ry. Co., 99 Fed. 907.

do not support his contention. On the contrary these cases hold that it is not reversible error for the Court to give the jury additional instructions after they have retired, without sending for counsel.

This narrows the case down to the single point whether a just judgment after a fair trial and after correct instructions to the jury is to be reversed because an entirely correct written answer to a written question was given without going through the formality of hunting up an unoccupied room, convening court and then doing exactly what was done by means of the written answer. It is clear that no prejudice resulted to the parties by the course actually pursued. The communication was in writing. The answer was in writing—both were preserved and put of record and an exception allowed. The answer merely repeated in substance what had been said in the charge. So far as it varied from the charge it was in favor of plaintiff, since the Court not only told the jury that to charge plaintiff with contributory negligence or assumption of risk they must find not only that he *fully* appreciated the danger, but that he did so after he had sufficient time to consider, and when no reasonable or prudent man would have done what he did.

The plaintiff's counsel was given the right to except. He could have had no more if he had been present, since he would have had no right to present requests for additional instructions or to require any addition to or variation of the instructions. This was settled in the case of

Maranda *vs.* Texas, &c. Railway, 124 Federal, 42,

in which the counsel was present, and requested that the Court add something to its instructions. The Appellate Court said:—

> "After the jury has retired, the functions of counsel "cease, and there should be no interference by them "with communications between the jury and the Court. "It is too late to present additional arguments or re- "quests. Information of what takes place should not, "however, be withheld from counsel, and they may "enter an exception to any action of the Court which "they deem prejudicial to their client's right."

The judgment was affirmed.

This is in accordance with the well settled rule and practice to the effect that no instructions can be asked for by counsel after the summing up of the case.

Keystone Bank *vs.* Safety &c. Co., 179 Fed. Rep. 727.

The only function which counsel could have served, had the written request been presented and answered in open court, would be to see that the request and instruction was entered on the record, and a bill of exceptions sealed, and inasmuch as the request and instructions in the present case were in writing, and were preserved, and a bill of exceptions was sealed thereto, no possible injury has been caused to the plaintiff. Nor has anything been done which is against public policy, since there were no secret communications and no oral interview between the Judge and the jury but simply a proper answer in writing to a proper request for additional instructions upon a point of law.

To summarize, the defendant in error respectfully submits:—

1. That there was no error in the substance of the instructions.

2. That the instructions were confined to the question of law upon which the jury asked additional instructions.

3. That there has been no possible injury to the plaintiff.

4. That under the circumstances the judgment ought not to be reversed for a mere technical error which was harmless.

RALPH B. EVANS,
For Defendant in Error.